



**IN THE COURT OF THE COMMISSIONER OF PATENTS
FOR THE REPUBLIC OF SOUTH AFRICA**

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGE: YES/NO
(3)	REVISED: YES/NO
_____ DATE	_____ SIGNATURE

Case No: 2024-039643

Patent no: 2007/10870

In the application of:

**THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA**

ASTELLAS PHARMA EUROPE LTD

ASTELLAS PHARMA INC

ASTELLAS PHARMA (PTY) LTD

and

EUROLAB (PTY) LTD

DIS-CHEM ONCOLOGY (PTY) LTD

First applicant

Second applicant

Third applicant

Fourth applicant

First respondent

Second respondent

DIS-CHEM ONCOLOGY DISTRIBUTION (PTY) LTD Third respondent

DIS-CHEM PHARMACIES (PTY) LTD Fourth respondent

and, in the counterapplication of:

DIS-CHEM ONCOLOGY (PTY) LTD First applicant

DIS-CHEM ONCOLOGY DISTRIBUTION (PTY) LTD Second applicant

DIS-CHEM PHARMACIES (PTY) LTD Third applicant

and

THE REGENTS OF THE UNIVERSITY

OF CALIFORNIA First respondent

ASTELLAS PHARMA EUROPE LTD Second respondent

ASTELLAS PHARMA INC Third respondent

ASTELLAS PHARMA (PTY) LTD Fourth respondent

EUROLAB (PTY) LTD Fifth respondent

Case No: 2023-108509

Patent no: 2007/10870

In the application of:

EUROLAB (PTY) LTD Applicant

and

THE REGENTS OF THE UNIVERSITY

OF CALIFORNIA First respondent

ASTELLAS PHARMA EUROPE LTD Second respondent

ASTELLAS PHARMA INC Third respondent

ASTELLAS PHARMA (PTY) LTD

Fourth respondent

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 25 FEBRUARY 2025.

Summary: Section 27 of the Patents Act, No. 57 of 1978 – ‘any other person acquiring from [the inventor] the right to apply’ interpreted – Properly interpreted the section provides that the person applying for the patent *must have already acquired* the right to apply from the inventor before making the application.

JUDGMENT

LE GRANGE, AJ:

INTRODUCTION

[1] For convenience, I shall refer to the parties as follows:

- **UC:** The applicants – The Regents of the University of California, Astellas Pharma Europe Ltd, Astellas Pharma Inc and Astellas Pharma (Pty) Ltd;
- **Eurolab:** The first respondent – Eurolab (Pty) Ltd; and
- **Dis-Chem:** The second- to fourth respondents – Dis-Chem Oncology (Pty) Ltd, Dis-Chem Oncology Distribution (Pty) Ltd and Dis-Chem Pharmacies (Pty).

- [2] This special motion comprises of three applications: (i) an application for an interim interdict brought by UC to restrain Eurolab and Dis-Chem from infringing South African Patent No. 2007/10870 (“**the patent**”) (“**the interim interdict application**”); (ii) an application for groundless threats of infringement regarding the patent brought by Eurolab against UC in terms of section 70 of the Patents Act 57 of 1978 (“**the act**”) (“**the groundless threats application**”); and (iii) a counter-application in the interim interdict application, brought by Dis-Chem for the revocation of the Patent (“**the revocation application**”).
- [3] Although the papers are voluminous the issues before me seems crisp and mainly concerns the validity of the patent, be that for adjudicating the groundless threat- and revocation applications, or to determine the existence of a *prima facie* right in the interim interdict application. Past this, is the question whether UC has satisfied the other requirements for interim relief as required.¹

Validity

- [4] The patent in issue is held by *the patentee*, UC, titled *Diarylhydantoin Compounds* and concerns a pharmaceutical compound known as *Enzalutamide*, identified in the patent as *RD162'4*, which has been marketed and sold in South Africa under the name Xtandi since March 2017. Xtandi is prescribed in the treatment of certain forms of prostate cancer in adult men including more specifically hormone refractory prostate cancer and hormone sensitive prostate cancer.
- [5] Eurolab is a generic oncology company conducting business in South Africa and is the holder of generic registration under registration number 55/26/0125

¹ *Setlogelo v Setlogelo* 1914 AD 221 227; *Hix Networking Technologies v System Publishers (Pty)* 1997 1 SA 391 (SCA) at 398I.

with the South African Health Products Regulatory Authority for a 40 mg product known as *Enzutrix*, a generic enzalutamide-containing medicine approved for the treatment of certain kinds of prostate cancer. Enzutrix has recently been launched in South Africa by Eurolab and is distributed by Dis-Chem.

- [6] Neither Eurolab nor Dis-Chem seriously disputes that the making, using, importing, marketing, distributing, and selling of their product, Enzutrix, constitute an act of infringement of the patent in South Africa. However, they justify their actions by claiming that the patent is invalid on two main grounds: (i) that the patentee was not a person entitled to apply for the patent in terms of section 27, which makes the patent liable to be revoked under section 61(1)(a) of the act; and (ii) that there had been a material misrepresentation regarding the priority date in applying for the patent, which makes the patent liable to be revoked under section 61(1)(g) of the act. Eurolab and Dis-Chem further dispute the subsistence of UC's right on the basis that the invention claimed in claims 1 to 7 is not patentable under sections 25(1), (6), and (10) of the act, read with section 61(1)(c), in that the invention does not involve an inventive step, making it obvious to a person skilled in the art, having regard to the prior art made available to the public before the priority date of 29 March 2006.
- [7] Regarding the groundless threats application, UC (now) admits the fact that their letters to Eurolab constitute a threat with proceedings for infringement but, justify their actions by claiming that the patent is valid.
- [8] The first relevant question then before this Court is whether the patent is valid, considering sections 61(1)(a) and/or 61(1)(g) of the act. If either of these grounds is established, the patent is invalid, and the threats are unjustified. This outcome would be dispositive of the matter in toto.

Section 61(1)(a)

- [9] Relevant to the first ground, sections 61(1)(a) and 27 of the act provide, in relevant part, that:

‘Section 61 Grounds for application for revocation of patent

- (1) Any person may at any time apply in the prescribed manner for the revocation of a patent on any of the following grounds only, namely-
- (a) that the patentee is not a person entitled under section 27 to apply for the patent . . .

Section 27 Who may apply for a patent

- (1) An application for a patent in respect of an invention may be made by the inventor or *by any other person acquiring from him the right to apply* or by both such inventor and such other person.’ [Emphasis added]

Any other person acquiring from the inventor the right to apply

- [10] It is not in dispute that UC is not the inventor and thus falls within the second category: ‘*any other person acquiring from [the inventor] the right to apply*’.
- [11] Relevant hereto, UC, in adherence to section 30 of the act and 8(1), 22(1)(c), 33 and 67B(4) of the Patent Regulations (“**regulations**”), filed a Declaration and Power of Attorney (“**form P.3**”) on 23 April 2008 wherein Ms. Cheryl Silverman (of UC) declared that: ‘the inventors of the abovementioned invention are the persons named above and the applicant *has acquired* the right to apply *by virtue of an assignment from the inventors*.’ [Emphasis added]

- [12] Eurolab claims the contrary, that the patentee (UC) was not entitled to apply for the patent because UC (not being the inventor) had not *acquired* the right to apply for the patent from the inventors of the patent *at the date on which the patent was filed* i.e., 29 March 2006. I will revert to the emphasized portions later herein.
- [13] In considering the correctness of Ms. Silverman's statement, the following common cause facts are relevant:
- [14] UC was the applicant for the patent in South Africa. The patent is a national phase filing, having been filed from international application number PCT/US2006/011417 ("**PCT**"). The PCT filing date (also referred to as the international filing date) is 29 March 2006. The lodging date of the national phase patent application at the South African patent office is 13 December 2007. The patent claims priority from US 60/680.835 dated 13 May 2005 (hereinafter referred to as "**P1**" and annexed to the founding affidavit in the groundless threat application as "LDT4". All subsequent "LDT" documents mentioned herein is to refer to annexures to this affidavit), US 60/750.351, dated 15 December 2005 (hereinafter referred to as "**P2**" and annexed as "LDT5"), and US 60/756.552 dated 6 January 2006 (hereinafter referred to as "**P3**" and annexed as "LDT6").
- [15] The application date is deemed to be the date of the filing of the PCT application according to section 43B of the act, namely 29 March 2006.
- [16] Form P.3 named UC as the applicant for this patent and listed 8 co-inventors, namely: Sawyers, Tran, Wongvipat, Jung, Chen, Ouk, Welsbie and Yoo.
- [17] In the premises, for UC to have had the right to apply for the patent, it needed to have acquired from all the above inventors the right [more specifically in

issue the rights of Swayers, Tran and Wongvipat] to do so before 29 March 2006.

- [18] I consider hereinunder the documents which may be relevant to determine whether these 3 inventors *had in fact assigned* their rights to UC. It follows that if one or more of them (or their assignee(s)) has not assigned their right(s), then UC has not acquired the right to apply for the patent.

Possible assignment(s)

- [19] The invention(s) was born out by collaborative medical research between UC and HHMI which was governed by a Collaboration Agreement (“AA1” to the answering affidavit in the groundless threat application) and a Patent Agreement (annexed thereto as annexure “H”) between them, signed in November 1986. In terms of the agreement HHMI was obliged *to* assign, and direct all their personnel *to* assign all rights, title and interest in HHMI Patentable inventions *directly* to UC.
- [20] The first three documents are the so-called “Intellectual Property Statements of Agreement” (“**IP Statements of Agreement**”) signed by Swayers, Tran and Wongvipat on 2 January 2003 (“LDT8”, “LDT9” and “LDT10” respectively) who at the time of the development of the invention were all employed by the Howard Huges Medical Institution (“**HHMI**”), and evidences that, with effect from 2 January 2003, these 3 (of the 8) inventors had assigned all their present and future rights to HHMI. These assignments seems to be in breach of the provision that all HHMI personnel had *to* assign all rights, title and interest *directly* to UC. Be that as it may, HHMI since 2 January 2003 owned all the rights of these 3 inventors, which include the right to RD162.

- [21] The fourth document is an assignment agreement, signed respectively on 27 July 2005 and 11 August 2005, by Swayers, Jung, Chen, Ouk and Welsbie, (“LDT12”, the **“P1 Assignment”**), which provide that the assignors sell, assign and transfer their rights in P1 to UC, and that the assignor(s) covenant that no assignment, sale, agreement, or encumbrance has been or will be made or entered into which would conflict this assignment. The P1 Assignment conflicts with the IP Statement Agreement as Sawyers had already (in terms of “LDT8”) assigned all his rights (to include P1) to HHMI in 2003.
- [22] The fifth document is signed by Swayers, 6 days later, on 17 August 2005 (“LDT14”, the **“Sawyers Assignment”**) in which Swayers purport to assign all his right, title and interest in the invention (defined therein as P1) to HHMI. This assignment also conflicts with the IP Statement Agreement as Sawyers had already assigned all his rights to HHMI.
- [23] Some 14 days later, on 31 August 2005, Swayers signed the sixth document “LDT14” (the **“Swayers Agency Appointment”**), which provided in relevant part as follows:

‘Appointment by the Howard Hughes Medical Institute (the “Institute”) of Charles L Sawyers, MD, an employee of the Institute, as its agent for the purpose of assigning *certain* rights to Regents of the University of California ... (The “University”)

WHEREAS, the Institute and the University collaborate in the active conduct of medical research pursuant to an agreement between them dated as of November 1, 1986 (the “Agreement”);

WHEREAS, pursuant to the Agreement, the Institute has agreed to assign to the University the Institute’s rights with respect to inventions, discoveries, improvements and other intellectual property, ... (each a “Subject Property”) ...

WHEREAS, research conducted pursuant to the Agreement by Charles L. Sawyers, MD, while employed by the Institute at the University has resulted *in the invention* of a certain Subject Property entitled “*Novel Androgen Receptor Inhibitors with Minimal Agonistic Activities*”, which is the subject of a patent application entitled “*Novel Androgen Receptor Inhibitors with Minimal Agonistic Activities*” filed in the US Patent and Trademark Office on May 11, 2005, and the Invention is a Subject Property; and

WHEREAS, the Institute wishes Charles L Sawyers, MD to act as its agent for the purpose of assigning to the University the rights the Institute has in the Invention by reason of the research program conducted at the University,

NOW THEREFORE, the Institute hereby appoints Charles L Sawyers, MD as its agent for the purpose of assigning the rights the Institute has or may acquire *in the Invention* by reason of the research program conducted at the University to the University in accordance with and subject to the conditions of this Agreement.’ [Emphasis added]

- [24] It is clear from this Swayers Agency Appointment that Sawyers’ authority as agent was granted to the invention of “*Novel Androgen Receptor Inhibitors with Minimal Agonistic Activities*”, which is the subject of a patent application entitled “*Novel Androgen Receptor Inhibitors with Minimal Agonistic Activities*” filed in the US Patent and Trademark Office on May 11, 2005, and the Invention is a Subject Property.’, which we know relate to P1. The Swayers Agency Appointment nowhere refers to any other or future inventions and was thus limited to P1.
- [25] It is not in dispute that the invention in the PCT application and indeed in the patent (which both refers to and claim RD162 (enzalutamide)) is different from the invention in P1, which does not mention RD162 at all.
- [26] In the premises, Swayers had no authority, under the Swayers Agency Appointment, as an agent of HHMI to assign their rights to RD162, to UC.
- [27] The seventh document, signed and executed by all 8 inventors from 24 May to 12 June 2006, is the Principal Assignment (“LDT15”, the “**Principal**

Assignment”) which relates to, *inter alia*, P1, P2, P3 and the PCT application, and purports to assign the rights of the inventors to these inventions, to UC. Notably again, this assignment also states that the assignor(s) covenant that no assignment, sale, agreement or encumbrance has been or will be made or entered into which conflict with this assignment. And again, this is impossible since 3 of the inventors had already assigned away their rights to HHMI – which now belonged to HHMI. This is however not where it ends, as this purported assignment, was signed after the filing of the PCT application. I will return to this issue later.

- [28] The eight and ninth documents (“LDT16”, dated 7 October 2008 and “LDT17” dated 14 October 2008) purports to assign Tran and Wongvipat rights in the invention, to HHMI – who already acquired these rights in 2003.

- [29] The final document (“LDT19”, the “**Agent Assignment Agreement**”) was signed by Sawyers on 29 November 2009, also after the filing of the PCT on 29 March 2006, and after the national phase application filed in South Africa on 13 December 2007. This document purports to assign HHMI rights which they acquired from Sawyers, Tran and Wongvipat to, *inter alia*, P1, P2, P3 and the PCT application, to UC and reads in relevant part as follows:

‘WHEREAS I *am acting for myself and as the agent* for Howard Hughes Medical Institute (“HHMI”) ... in conveying all right, title and interest of HHMI;

For good and valuable consideration, the receipt of which is hereby acknowledged, ASSIGNOR,

Charles L SAWYERS

hereby sells, assigns and transfers to ASSIGNEE, The Regents of the University of California ... all of the right, title and interest for the United States and its territorial

possessions and in all foreign countries in and to, any and all improvements which are disclosed in the inventions entitled:

DIARYLHYDANTOIN COMPOUNDS

which is found in: [A list of patent applications including P1, P2, P3 and the PCT is annexed.]’

[30] As Swayers cannot in law establish the fact of his own agency² he claims³ that the Agent Assignment Agreement was signed pursuant to the agency appointment under the Swayers Agency Appointment (i.e. the sixth document discussed above), which I have already established, only authorized Swayers to assign P1.

[31] Considering all the above, the allegation by Ms. Silverman – that the UC *has acquired* the right to apply *by virtue of an assignment* from the inventors – is left empty and UC has failed to adduce any other evidence in rebuttal, that UC has acquired the rights for RD162 from HHMI – who in turn acquired it from Swayers, Tran and Wongvipat in 2003.

Third party not to contest the existence of a contract or its terms if the contracting parties themselves are ad idem thereto.

[32] A further argument advanced by UC is that section 27 was never intended to deal with, or to provide an opportunistic applicant for revocation, the current situation, where not one of the named inventors disputes, that UC was entitled to apply for the patent in its own name – should be considered.

² *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 1 SA 300 (T) at 303 and 305; *Volkswagen Bank Bpk v Bonitas Medical Aid Fund* 1993 (3) SA 779 (A) at 789I – J; *MEC for Safety and Security, Eastern Cape v Mtokwana* 2010 (4) SA 628 (SCA) at para 20.

³ See the answering affidavit of Swayers to the groundless threat application at paras 3.7 and 3.8, Caselines at C244-C245.

- [33] Not dealing with the instance of estoppel, I agree with the principle advanced by UC (as raised in *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) and *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA)) that it is not open to a third party to contest the existence of a contract or its terms if the contracting parties themselves are *ad idem* thereto, even if the third party's interpretation accords with an apparent meaning of a written document.
- [34] Mutual assent lies at the foundation of this principle, something that *only* the contracting parties themselves can validate.
- [35] The problem, however, is that HHMI is not a party to any of the proceedings before me nor has it validated the existence of the alleged assignment of RD162 (and the terms under which it is assigned) to UC, in the papers before me – something that UC could easily have rectified if it existed. The various purported assignments, rather indicate that Swayers, Tran, and Wongvipat could not get HHMI to re-assign the rights, which they assigned to it in 2003, to UC and instead attempted several times to do so themselves, either by a purported direct assignment to UC, or through the Principal Assignment and the Agent Assignment Agreement, without having proper authority from HHMI.
- [36] With this consideration, I do not give my stamp of approval that, even if it had been validated, UC would have been entitled as of right to apply for the patent. This is specifically due to other provisions in the act which may come into play – something I have not fully considered, given my initial finding that no validation has been advanced by HHMI.

Interpretation issue

[37] As a final argument, UC contended that the phrase ‘acquiring from [the inventor] the right to apply’ when properly interpreted, does not require that such a person (in this instance, UC) must have *already acquired* the right to apply from the inventor – through an act of assignment or similar act – at the time of the application. UC further argued that an agreement *to* assign constitutes a right to apply for the purposes of section 27. The two points advanced were stated as follows:

‘[C]ontrary to the positions, under section 8 of the repealed 1952 Patens Act, section 27 of the current Act uses [the argument goes purposefully] the present progressive tense (“acquiring”) rather than the past tense (“acquired”). The present progressive tense is used when the act in question (in this case, the acquisition of the right to apply) is still in progress. The tense may also be used to refer to future actions. Eurolab’s submission that UC had to have acquired (past tense) the right to apply for the patent at the date on which the patent was filed therefore finds no support in the wording of section 27.’

and

‘[C]ontrary to the position under the 1952 Patens Act, section 27 and the current Act makes no reference to an assignment agreement and does not refer to an applicant that is not an inventor as an “assignee”. Section 27 stipulates only that the [person] that applies for the patent has, or is acquiring, the “right to apply” for the patent from the inventor/s. What this means simply, is that, if not the inventor the [person] that makes the application for the patent must be entitled to do so pursuant to an agreement or agreements with the inventor/s which vests the right to apply for the patent in the [person]. The applicant [person] need not have taken assignment of the invention (at the filing date) to employ the right to apply. *The right may equally vest in the [person] if the inventor is obliged, inter partes, to assign all rights in the invention to the [person]*. It follows that if an inventor has agreed to assign all his or her inventions, developed in a particular context, to a [person] (as often happens when the inventor is contracted to perform work for the [person]) then the [person]

has the right to apply for a patent in respect of any invention made by the inventor in that context. The right vests in the [person] because the inventor is obliged *inter partes* to assign the invention to the applicant [person];’ [Emphasis added]

- [38] The parties correctly pointed out that the approach to statutory interpretation is now well established, as stated by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*⁴, and that the starting point in all interpretative exercises is the language used in the section.
- [39] Considering the above, UC’s argument that section 27 uses the present progressive tense – “acquiring” – fails at the starting point.
- [40] A verb construction in the present progressive tense consists of the auxiliary verb *be* (“is” or “are”) in the present tense, followed by the present participle of the main verb. This tense is specifically used to indicate that a present action or event is in progress, being repeated, or of a temporary nature, and it is also used to express the future.⁵
- [41] The absence of an auxiliary verb in the present tense indicates that the word “acquiring” in section 27 is *not* being used as part of a present progressive verb construction. This interpretation makes logical sense, as the present progressive tense inherently excludes the past tense. If UC’s interpretation were correct, most – if not all – patent applications where the applicant had already acquired the right to apply from the inventor would be up for attack.
- [42] Furthermore, in isolation, the verb “acquiring” is in the present participle form, which generally indicates an action happening at the same time as another

⁴ 2019 2 BCLR 165 (CC) para 29.

⁵ <https://www.dictionary.com/browse/present-progressive>

action in the sentence. It can also imply a state that must be true before the main action occurs.

- [43] Considering that the sentence does not use “acquires” (simple present) or “will acquire” (future), both of which would suggest that the acquisition of the right could happen at any time, the phrasing implies that the acquisition of the right must have already taken place before the application is made. This interpretation is further supported by the words “may be made” in the sentence, which are in the passive voice and express future possibility – meaning the application can be submitted if one of the three stated conditions is met.

- [44] If the sentence is further considered, it is incumbent that the right to apply must originate from the inventor. I thus agree with Eurolab’s interpretation that the phrase “acquiring from the inventor the right to apply” functions as an adjectival phrase describing the applicant. It identifies the source of the applicant's right as originating from the inventor.

- [45] If UC’s argument were correct – that an assignment could be acquired after the application for the patent, and even after its grant, at some indefinite point in the future – the proviso “acquiring from [the inventor] the right to apply” and section 27 in its entirety would become meaningless. Under UC’s interpretation, *any* person could apply for a patent as long as it “[is] acquiring” the right at some point in the future. This would lead to an absurd result: a patentee who obtained a patent under such circumstances could simply argue, when challenged, that it is still in the process of acquiring the right (the test to be applied, I have not even tried to consider), all while benefiting from the invention to the detriment of both the inventor (if the latter ever intended to secure a patent) and the public, who would be forced to pay a monopoly price.

- [46] UC's argument that Eurolab's interpretation would lead to undue hardship and potential absurdity, and the example used to support it, is opportunistic. If an applicant is unable to obtain the right to a patent from the inventor before lodging an application – notwithstanding an agreement to assign (however enforceable or unenforceable it may later prove to be) – they must seek recourse against the inventor if they ultimately suffer damages. It is absurd to suggest that such an applicant would be entitled to reap the fruits of an invention while it litigate its claim to, or negotiate, the right to the patent. While the inventor may, in such a case, be compensated for their damages if a court rules in their favor and execution is successful, but the public – who would have paid an excess for the use of the patent – would have unfairly suffered losses at the hands of such an applicant, that could never be fully recovered.
- [47] In the premises, I find that the phrase 'any other person acquiring from [the inventor] the right to apply' in section 27, properly interpreted provide that such person applying for the patent *must have already acquired* the right to apply from the inventor prior to filing the patent application, be that through an assignment, agreement, or another legal mechanism.
- [48] I agree with Eurolab and Dis-Chem's argument that this interpretation is also in line with:
- (i) The purpose of the act, to accomplish certainty in patents and patent specification. An *inter partes* agreement, or promise, to assign a right in future, will not accomplish certainty in a patent – it would leave the patent's right to exist, hanging in the air.
 - (ii) Regulation 22 of the regulations which provides that:

'22 Application for the grant of the patents

- (1) An application for a patent shall be made on form P 1 and shall be *accompanied* by the following documents –

...

- (d) where the applicant *has acquired* a right to apply from the inventor, *an assignment* or other proof, to the satisfaction of the registrar, of the right of the applicant to apply ...’ [Emphasis added]

- (ii) The leading South African commentators in textbooks and articles, as follows:

- In *Burrell’s*⁶ the author states, with reference to section 27(1), that ‘[o]n the date on which the application is filed, the assignee applicant must be entitled to apply and it follows that a deed of assignment or the like must bear a date on or before the date of filing of the application.’
- In *Practitioner’s Guide to Intellectual Property*⁷ it is stated that: ‘Any person other than the inventor making or joining an application for a patent must in the prescribed manner furnish such proof of his title or authority to apply for a patent as may be prescribed (section 30(2)). Thus, where the applicant acquired a right to apply from the inventor, an assignment or other proof to the satisfaction of the registrar of patent, of the right of the applicant to apply must accompany the application.’

[49] For the reasons stated, I further find that the time to consider whether a patent is liable to be revoked under section 61(1)(a) read with section 27 must be determined at the time that the application for a patent was made.

⁶ Burrell’s South African Patent and Design Law, T D Burrell, 2016, 4th Edition at para 2.18.

⁷ Adams & Adams. Print Book, English, 2011. Publisher: LexisNexis, Durban, 2011.

[50] Considering that no such assignment existed at the time specified, the patent is invalid and stands to be revoked.

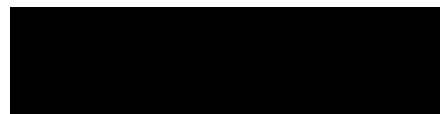
[51] The least that an applicant can do, to entitle it to a 20-year monopoly, is to adhere to the provisions of the act which grant such a monopoly. If an applicant fails to do so the right to the monopoly stands to be revoked, at the hand of *any* person, through a remedy specifically created for that purpose, the resorting to it which cannot be classified as opportunistic or highly technical.

Order

[52] In the result the following order is made: -

1. The non-compliance by the parties with the provisions relating to forms and services are condoned.
2. The application by The Regents of the University of California, Astellas Pharma Europe Ltd, Astellas Pharma Inc and Astellas Pharma (Pty) Ltd brought under Case No: 2024-039643 is dismissed.
3. The application by Eurolab (Pty) Ltd brought under Case No: 2023-108509 is granted to the extent that the threats of infringement proceedings made by The Regents of the University of California, Astellas Pharma Europe Ltd, Astellas Pharma Inc and Astellas Pharma (Pty) Ltd in relation to South African Patent No. 2024-039643 are found to be unjustifiable.
4. The Regents of the University of California, Astellas Pharma Europe Ltd, Astellas Pharma Inc and Astellas Pharma (Pty) Ltd are interdicted and restrained from a continuance of these threats.

5. The counter application by Dis-Chem Oncology (Pty) Ltd, Dis-Chem Oncology Distribution (Pty) Ltd and Dis-Chem Pharmacies (Pty) under Case No: 2024-039643 is granted to the extent that Patent No. 2007/10870 is revoked in terms of section 61(1)(a) as read with section 27 of the Patents Act, No. 57 of 1978.
6. The Regents of the University of California, Astellas Pharma Europe Ltd, Astellas Pharma Inc and Astellas Pharma (Pty) Ltd, shall pay the costs of all the applications (the one paying the other to be absolved) to include the costs of two counsel (where so employed) on scale C for senior counsel and scale B for junior counsel.
7. Each party is to pay the fees of their own expert witnesses.



A J LE GRANGE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

COUNSEL FOR THE APPLICANTS:

Gavin Marriott instructed by
Adams & Adams Attorneys.

COUNSEL FOR THE FIRST RESPONDENT: ABS Franklin SC and CC Bester
instructed by Von Seidels
Intellectual Property Attorneys.

COUNSEL FOR THE SECOND-
TO FOURTH RESPONDENTS:

R Robinson SC and F Landman
instructed by Margo Attorneys Inc.